Supreme Court, U.S.
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No. 95-1069

In The
Supreme Court of the United States
October Term, 1996

HOFFMAN CONTROLS CORPORATION,
Petitioner,

v.

BURGESS-SAIA, INC. AND LANDIS & GYR, INC.
Respondents.

Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the panel of the Fifth Circuit Court of Appeals err by affirming, in conflict with established federal precedent of this Court, the district court's summary judgment for Respondent on the basis of *res judicata* where Respondent failed to discharge its initial burden under Fed. R. Civ. Proc. 56 of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on each element of Respondent's affirmative defense?

2. Did the panel of the Fifth Circuit Court of Appeals err by holding, in conflict with established federal precedent of this Court, that Petitioner was required to respond and contest Respondent, Landis & Gyr's, summary judgment claim of privity where Respondent failed to establish the absence of a genuine issue of material fact as to every element of its affirmative defense?

3. Did the panel of the Fifth Circuit Court of Appeals err by affirming, in conflict with the established law of *res judicata*, the district court's summary judgment for Respondent on the basis of *res judicata* where Respondent failed to establish *res judicata* privity as a matter of law?

PARTIES

Pursuant to Rules 14.1(b) and 29.1, Petitioner certifies that the following is a complete list of all parties to this proceeding, including parent companies and subsidiaries (except wholly owned subsidiaries):

1. Hoffman Controls Corporation[1] — Petitioner/Appellant.

2. Burgess-SAIA, Inc. — Respondent/Appellee.

3. Landis & Gyr, Inc. — Respondent/Appellee.

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[1] Pursuant to Rule 29.1, Petitioner certifies that Hoffman Controls Corporation has no parent or subsidiary company.

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REPORTS OF OPINIONS

A copy of the United States Court of Appeals for the Fifth Circuit Opinion and Judgment is attached hereto as Appendix 2. The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Northern District of Texas Dallas Division. A copy of the Judgement of the United States District Court for the Northern District of Texas Dallas Division is attached hereto as Appendix 3. A copy of the Opinion of the United States District Court for the Northern District of Texas Dallas Division is attached hereto as Appendix 4. A copy of the Finding of Fact and Conclusions of Law of the 44th Judicial District Court of Dallas County, Texas is attached hereto as Appendix 5. A copy of the Judgment of the 44th Judicial District Court of Dallas County, Texas is attached hereto as Appendix 6.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its decision affirming the District Court for the Northern District of Texas — Dallas Division's decision granting summary judgment for Respondents on October 2, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 56 of the Federal Rules of Civil Procedure (*see*, Appendix 7.)

STATEMENT OF THE CASE

In September of 1983, Petitioner, Hoffman Controls Corporation ("Petitioner" or "Hoffman") issued a purchase order to Respondent, Landis & Gyr, Inc. ("Respondent" or "Landis") for two different series of gearbox assemblies: the "Ba" series and "F" series.[2] Thereafter, Hoffman purchased, over the course of many years, over 13,500 Ba gearboxes pursuant to different invoices issued on different dates. (Tr. Vol. 7, pp. 104-109 and 111-116, p. 16). On March 23, 1987 Landis sold the division of its company which distributed the gearboxes to Burgess-SAIA, Inc. ("Respondent or "Burgess") under an "Asset Sale Agreement."

Hoffman incorporated the Ba gearbox into a heating, ventilation and air conditioning device referred to as the 201-5A actuator.[3] *Id.* The F gearbox was incorporated into a Hoffman Controls'

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[2] For purposes of brevity, the "Ba series motor gearbox assembly" will hereinafter be referred to simply as the "Ba gearbox" and the "F series motor gearbox assembly" shall be referred to as the "F gearbox."

[3] The 201-5A heating, ventilation and air conditioning control device will hereinafter simply be referred to as the "201-5A actuator."

heating, ventilation and air conditioning actuator identified as the 201-7A actuator.[4] *Id.*

Beginning in 1989, Hoffman noticed an acceleration in its customers' return of the 201-5A actuator — which incorporated the Ba gearbox. *Id.* In order to attempt to determine the cause of the failure of the Hoffman 201-5A actuator which incorporates the Ba gearbox, Hoffman authorized its chief engineer, William Bowman, to conduct a life test on the 201-5A actuator and Ba gearbox. (Tr. Vol. 7, pp. 104-116). On October 22, 1990, Mr. Bowman concluded his life tests of the Ba gearbox (the 6 minute motor) and reported his findings to the Chairman of the Board of Hoffman, Mr. Howard Byrnes. *Id.* On October 22, 1990, Mr. Bowman, on the basis of his tests, concluded that the failures in the Hoffman 201-5A actuator were occurring because the Ba gearbox sold to Hoffman by Landis would not continuously stall without failure as required by Hoffman's contract with Landis and that the inability of the Ba gearbox to continuously stall without failure resulted in the gears in the 201-5A actuator either stripping or locking up. *Id.*

By invoice dated December 20, 1990, Burgess-SAIA, Inc. ("Burgess") sold to Hoffman 500 F gearboxes which formed the basis of Burgess' collection judgment in state court. The invoice related to the F gearbox only, not the Ba gearbox. (Tr. Vol. 7, p. 115). The specific 500 F gearboxes purchased by Hoffman from Burgess in December of 1990 and made the basis of the Burgess state court sworn account claim did not fail and Hoffman does not contend in this action that the F gearboxes are defective. (Tr. Vol. 7, pp. 108, 109, 111-116).

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[4] The heating, ventilation and air conditioning product which incorporates the F gearbox and referred to as the 201-7A actuator will, for the purposes of brevity, hereinafter be referred to simply as the "201-7A actuator."

Burgess, not Landis, sued Hoffman in state court and claimed that Hoffman had failed to pay the December 20, 1990 invoice for F gearboxes. Hoffman did not contest Hoffman's refusal to pay the invoice. Landis was not a party to the state court action. The state court rendered a Judgment (Appendix 6) and entered findings and fact and conclusions of law (Appendix 5). Thereafter, in the instant action, Hoffman sued Respondents Burgess and Landis. Hoffman claimed that Landis sold Hoffman Ba gearboxes beginning in 1983 which were defective and which did not meet the specifications agreed to between the parties. Hoffman sought over $5,000,000.00 in damages. Burgess and Landis answered Hoffman's complaints in this action and asserted that Hoffman's claims concerning the Ba gearbox were barred by the affirmative defense of *res judicata*. Burgess and Landis filed Motions for Summary Judgment based upon their affirmative defense of res judicata arising out of a prior state court judgment in favor of Burgess (not Landis) against Hoffman on a debt of $10,000.00 for 500 F series gearbox assemblies sold in December 1990.[5]

Landis' Motion for Summary Judgment pursuant to res judicata was based upon Landis' contention that Landis was a "party in privity" with Burgess and that Landis was "sufficiently related" to Burgess to entitle Landis to stand in Burgess' shoes for purposes of res judicata. Landis offered no summary judgment evidence refuting as a matter of law the alleged fraudulent representations made by Landis' agents to Hoffman which induced Hoffman to purchase Ba gearboxes. Hoffman responded to Landis' motion by challenging Landis' failure to meet the necessary summary judgment requirements under Rule 56 of the Federal Rules of Civil Procedure. Specifically, Hoffman contended that because Landis failed to discharge its initial burden of

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[5] Landis (not Burgess) additionally moved for summary judgment based upon the statute of limitations. The District Court did not reach or rule on this Motion.

establishing each element[6] of its affirmative defense of *res judicata* as a matter of law, Hoffman, therefore, was not required to respond and offer evidence establishing a genuine issue of material fact.

On November 10, 1994, the United States District Court for the Northern District of Texas Dallas division, the Honorable Jerry Buchmeyer, granted both Burgess and Landis a Summary Judgment on the affirmative defense of *res judicata*. (App. 3 & 4). Hoffman perfected its appeal to the United States Court of Appeals for the Fifth Circuit on December 2, 1994. On October 2, 1995, a panel of the Fifth Circuit Court of Appeals, filed its Memorandum Decision affirming the District Court's grant of summary judgment on the affirmative defense of *res judicata*. (App. 2).

Hoffman contended in the district court and before the panel that Landis' "privity argument" was immaterial to the issues raised in Landis' Motion for Summary Judgment because Landis' privity argument was based on the erroneous premise that, for purposes of *res judicata*, a predecessor in interest is "in privity" with a successor in title. Because a predecessor is not in privity with a successor in title for *res judicata* purposes, Landis' argument must fail as a matter of law. The panel ignored Hoffman's "immaterial and irrelevant" response to Landis' "privity argument." The panel concluded that "Landis' privity was a material and relevant issue, as it is only through privity that Landis could benefit from the state court judgment." However, under the established law of *res judicata*, it is clear that a predecessor in interest is not in privity, for *res judicata* purposes, with its successor in title. The summary judgment evidence established that Landis' privity with Burgess is as a predecessor in interest, not a successor in interest. Hoffman contends that the panel

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[6] Hoffman contends that Landis failed to establish the element of privity for purposes of its summary judgment motion based on res judicata.

applied an erroneous summary judgment burden on Hoffman, the non-movant, by shifting the burden on Hoffman to refute Landis' affirmative defense of *res judicata*. Hoffman further contends that the panel erroneously construed the Burgess/Landis contract in applying the res judicata doctrine.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This is an appeal of the Fifth Circuit's decision affirming the District Court's decision granting summary judgment for Landis pursuant to Federal Rule of Civil Procedure 56. The Fifth Circuit panel made serious errors in assigning the burdens of proof under Rule 56. The panel incorrectly applied the law under Rule 56 in requiring Petitioner to respond and refute Landis' summary judgment motion based on Landis' affirmative defense of *res judicata*. The Fifth Circuit's opinion is contrary and contradictory to well established rules of law and decisions of numerous federal courts of appeal, federal district courts, and of this Court.

A review by this Court of the Fifth Circuit panel's decision is warranted in this case because the opinion of the panel conflicts with and holds differently from prior decisions of the Fifth Circuit, numerous other courts of appeals, Texas federal district courts and from opinions of this Court on questions relating to the burden of proof under Federal Rule of Civil Procedure 56. The Fifth Circuit panel's holding is in direct conflict with this Court's interpretation of Rule 56 and conflicts with the following opinions of this Court and the Fifth Circuit:

1. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986);

2. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970).

3. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994);

4. *Russ v. International Paper Co.*, 943 F.2d 589 (5th Cir. 1991).

5. *Hibernia Nat. Bank v. Admin. Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985);

6. *John v. State of La. (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir. 1985);

7. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981);

8. *Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981);

9. *Montgomery v. Boshears*, 698 F.2d 739, 741 (5th Cir. 1983);

10. *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973).

In the decisions of *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, (1986) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970), this Court addressed in detail the law of summary judgments pursuant to Rule 56. Specifically, *Celotex* and *Adickes*, clarified the shifting burdens of proof under Rule 56. In both cases, this Court confirmed that under Rule 56, the moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157. As stated by this Court in Adickes:

> where the evidentiary matter in support of [a summary judgment] motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

Adickes v. S.H. Kress & Co., 398 U.S. at 157 (quoting the Advisory Committee Notes on the 1963 Amendment to Rule 56).

Thus, under the stringent summary standards adopted by this Court, Landis, as movant, bears the initial burden of proof and Hoffman, as non-movant, is required to respond to Landis' motion *only after* Landis meets its initial burden. As the record in this case establishes, Landis' summary judgment motion does not conclusively establish, as a matter of law, an essential element required to entitle Landis to summary judgment on the ground of res judicata — *i.e.*, the existence of sufficient and legally proper "privity" between Landis and Burgess. Legally proper privity for purposes of *res judicata* must be established before Landis can claim res judicata as a result of Burgess' debt judgment in state court against Hoffman.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *CELOTEX CORP. V. CATRETT* AND *ADICKES V. S.H. KRESS & CO.* AND ESTABLISHED FIFTH CIRCUIT PRECEDENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

Initially, at least, the record must be reviewed to determine if Landis has fulfilled the stringent summary judgment requirements for establishing, as a matter of law, that there are no genuine issues of material fact in dispute as to Landis' affirmative defense of res judicata. Under federal law, all reasonable inferences that can be deduced from the pleadings, affidavits and other summary judgment evidence must be resolved in favor of the non-movant, Hoffman. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356-57 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986). The record fails to conclusively determine, as a matter of law, facts sufficient to support summary judgment for Landis based on the affirmative defense of res judicata.

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for summary judgment. It provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). A party who moves for summary judgment under Rule 56 must meet this exacting standard. When the movant is seeking summary judgment on the basis of an affirmative defense to which the movant bears the ultimate burden of proof at trial, as in this case, the movant must establish the absence of a genuine issue of material fact as to every element of the affirmative defense whether the non-movant responds or not. *Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986)); *Brenham Community Protective Ass'n. v. U.S. Depot of Agric.*, 893 F.Supp. 665, 668 (W.D. Tex. 1995); *Marshall v. Hobs. Auth. of the City of Taylor*, 866 F.Supp. 999, 1002 (W.D.Tex. 1994), *aff'd*, 51 F.3d 1045 (5th Cir. 1995); *Bob Hamric Chevrolet, Inc. v. IRS*, 849 F.Supp. 500, 507 (W.D. Tex. 1994); *see also, Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). In other words, Landis must establish the affirmative defense as a matter of law such that no reasonable jury could enter a verdict for the non-movant. Any doubt as to the existence of a genuine issue of material fact must be resolved by the court against the movant. *See, Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Only *after* Landis satisfies this onerous burden, does the burden shift to Hoffman to proffer evidence sufficient to create a genuine issue of material fact as to any element essential to the affirmative defense. As stated in Rule 56(e):

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may

> not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*"

Fed. R. Civ. Proc. 56(e) (emphasis added). Thus, it is absolutely clear under the law of this Court and the Fifth Circuit, that pursuant to the shifting burdens contemplated under Rule 56, Hoffman is under no obligation to respond to a motion for summary judgment unless Landis discharges its initial burden of showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Montgomery v. Boshears*, 698 F.2d 739, 741 (5th Cir. 1983); *Bluebonnet Sav. Bank v. FDIC*, 891 F.Supp. 332, 336 (N.D. Tex. 1995); *Dallas Fire Fighters Ass'n v. City of Dallas, Tex.*, 885 F.Supp. 915, 920 (N.D. Tex. 1995); *Dorety v. Avondale Shipyards of Texas, Inc.*, 672 F.Supp. 962, 963 (S.D. Tex. 1987).

If Landis fails to discharge its burden, summary judgment must be denied — even if Hoffman has not responded to the motion at all. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Hibernia Nat'l Bank v. Admin. Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985); *John v. State of La. (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir. 1985); *see also, Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981) ("A party opposing summary judgment need not respond or file counter-affidavits or other evidentiary materials under Rule 56 if the affidavits and other evidence of the moving party are intrinsically insufficient to establish its entitlement to summary judgment"); *Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) ("[t]he non-moving party is not required to respond unless and until the moving party has properly supported the motion with sufficient

evidence"); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973).

Thusly, the panel's conclusion that "Hoffman did not contest Landis' claim of privity" is inapposite to the summary judgment procedures. Hoffman did contest Landis' claim of proper and legally binding privity for purposes of res judicata. Hoffman did not, however, contend that Landis had no privity since the evidence established that there was an asset sale agreement which created *contractual* privity. However, Hoffman contended that the privity was not the type of privity that would entitle Landis to the benefits of Burgess' res judicata claim and, therefore, that the type of privity asserted by Landis was irrelevant and immaterial to the legal analysis Landis hoped to achieve. The panel erroneously concluded that Hoffman had the burden of responding to Landis' motion even though Landis did not meet its initial burden. Landis failed to show that the asset sale agreement, dated March 23, 1987 between Landis and SAIA-Inc., entitled Landis to argue res judicata through its "privity" with Burgess. The panel's analysis is flawed and the ultimate conclusion reached by the panel is contrary to longstanding federal precedent concerning summary judgment standards and the shifting burdens under Rule 56.

In *Russ v. International Paper Co.*, 943 F.2d 589 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992), the Fifth Circuit discussed the burdens each party must carry on a motion for summary judgment in light of this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317. 943 F.2d at 591. In *Russ*, the court explained that *Celotex* is commonly cited out of context for the proposition that once a party moves for summary judgment the non-moving party must respond with evidence establishing genuine issues of fact in order to defeat the motion. *Id.* Dismissing such argument as a "common misinterpretation," the Fifth Circuit noted that "simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of facts." *Id.*

The court further explained that *Celotex* did not change the law under Rule 56 as to which party carries the initial burden on a motion for summary judgment. On this point, the Fifth Circuit stated:

> *Celotex* makes clear that before the non-moving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial.
>
> > 'Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'
>
> Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. The Court specifically approved its earlier decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) which stated that the party opposing a motion for summary judgment must respond only after the moving party meets its initial burden.

943 F.2d at 591.

Applying Supreme Court and Fifth Circuit law to the facts of this case, it is clear that the summary judgment granted by the District Court and affirmed by a panel of the Fifth Circuit is erroneous as a matter of law whether Hoffman responded to the motion or not. It is also clear that the decision of the panel of the Fifth Circuit affirming the District Court's summary judgment misapplies and conflicts with existing Fifth Circuit and United States Supreme Court precedent. Because the record and summary judgment evidence presented by Landis cannot establish the absence of any genuine issues of material fact and cannot establish Landis' entitlement to summary judgment as a matter of law,

the panel's decision is erroneous and contrary to established precedent of the Fifth Circuit and this Court.

Under Fifth Circuit law, Landis, in seeking summary judgment on the basis of the affirmative defense of *res judicata* — an issue on which Landis would bear the ultimate burden of proof at trial — is required to establish every element of *res judicata* as a matter of law. *See, Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994). Until Landis satisfies this stringent and onerous burden, non-movant, Hoffman, has no duty to contest Landis' motion and no obligation to proffer evidence sufficient to create a genuine issue of material fact. In fact, under Fifth Circuit law, Hoffman, as the non-movant, has no obligation to respond whatsoever *unless and until* Landis, as movant, satisfies its initial burden and establishes each element of res judicata as a matter of law. Because Landis failed to properly support its motion for summary judgment with sufficient evidence to establish an essential element of its affirmative defense, *i.e.* privity, summary judgment was improper regardless of whether Hoffman responded to Landis' privity claim or not. Contrary to the panel's reasoning, Hoffman was not required to contest privity at the district court level because Landis, on whom the initial burden rested, failed to establish privity for res judicata purposes as a matter of law.

II. THE DECISION BELOW CONFLICTS WITH THE ESTABLISHED LAW OF PRIVITY FOR PURPOSES OF *RES JUDICATA*.

In order to discharge its initial burden of proof under Rule 56, Landis was required to establish each of the following elements of *res judicata* as a matter of law:

(1) identical parties or *privies* in both suits;

(2) the prior judgment must have been rendered by a competent tribunal; and

(3) the claim must have been a claim litigated in the prior action.

Rosedale Partners Ltd. v. Resolution Trust Corp., 882 S.W.2d 622 (Tex. App. — Corpus Christi 1994, writ denied) (emphasis added); *see, Texas Water Rights Comm'n v. Crow Ironworks*, 582 S.W.2d 768 (Tex. 1979). However, as the summary judgment record establishes, Landis failed to show, as a matter of law, that the parties were in privity for *res judicata* purposes. Under the law of *res judicata*, a non party to the previous suit (Landis) is in privity with a party (Burgess) in three instances:

(1) If the non party is a *successor* in interest to the party's interest in the property;

(2) If the non party controlled the prior litigation; or

(3) If the party adequately represented the non party's interest in the prior proceeding.

Benson & Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172 (5th Cir. 1987); *see also, Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990).

In its motion for summary judgment, Landis claimed it was in privity with Burgess for *res judicata* purposes, based on a succession in interest relationship — the first item above. Landis maintained that by proffering an Asset Sale Agreement dated March 23, 1987 between Landis and SAIA, Inc. it established with sufficient evidence "the fact and legal ramifications of privity between Landis and Gyr and its purchaser/successor in interest (*i.e.*, Burgess)." Landis' argument, however, was erroneous as a matter of law because the contractual privity created by such agreement is irrelevant and immaterial to the privity required for *res judicata* purposes. According to well-established law, privity for *res judicata* purposes based on a successive relationship is not

reciprocal in operation between predecessor and successor. *See,* Restatement (Second) of Judgments § 43 cmt. e; 1B Moore's Federal Practice ¶ 0.411 (1993). To the contrary, while a successor is privy in estate to the predecessor, the reverse is not true unless there has been a retransfer from the successor to the predecessor. *Id.; see also, Litton ABS v. Red Yellow Cab Co.,* 411 N.E. 2d. 808, 811 (Ohio Ct. App. 1978); *Howell Hydrocarbons, Inc. v. Adams,* 897 F.2d at 188; *Southwest Airlines Co. v. Texas Int'l,* 546 F.2d at 84.

Simply stated, a predecessor in interest cannot claim the rights and privileges of the successor in interest. A judgment against the successor in interest does not estop a cause of action against the predecessor in interest under *res judicata. See, Freeman on Judgments* 969 (5th ed. 1925); 1B *Moore's Federal Practice* ¶ 0.411 (1993); Restatement (Second) on Judgments § 89 cmt. e. For *res judicata* purposes, privity flows only one way. Thus, while the Asset Sale Agreement between Landis and SAIA may evidence the existence of contractual privity for business purposes, it does not evidence the type of privity necessary to establish *res judicata* as a matter of law. As such, the Asset Sale Agreement is clearly insufficient evidence to establish the element of privity, and therefore, insufficient to discharge Landis' initial burden of establishing each essential element of *res judicata* as a matter of law under Rule 56.

Accordingly, because the only evidence proffered by Landis to establish the element of privity for *res judicata* purposes was the Asset Sale Agreement and because this evidence was intrinsically insufficient to establish *res judicata* privity as a matter of law, Landis failed to discharge its initial burden, and therefore, Hoffman Controls as the non-movant had no obligation to respond to Landis' privity argument. *See, Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994); *Hibernia Nat'l Bank v. Admin. Central Sociedad Anonima,* 776 F.2d 1277, 1279 (5th Cir. 1985); *John v. State of La. (Bd. of Trustees for State*

Colleges and Universities), 757 F.2d 698, 708 (5th Cir. 1985); *Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981); *Envtl Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Thusly, the panel violated clearly established Fifth Circuit and United States Supreme Court precedent by shifting the burden in a summary judgment proceeding to the non-movant (Hoffman) where the movant (Landis) clearly had the burden of establishing its entitlement to summary judgment on an affirmative defense and clearly failed to do so. The panel's decision required Hoffman to respond to Landis' Motion for Summary Judgment on the affirmative defense raised by Landis even though Landis failed, as a matter of law, to establish its entitlement to a summary judgment on res judicata. The panel's erroneous shifting of the burden to Hoffman violates well established United States Supreme Court and Fifth Circuit precedent and clearly leads to an erroneous decision.

CONCLUSION

Based on the above argument and authorities, the decision of the panel of the Fifth Circuit Court of Appeals affirming the District Court's summary judgment on the basis of res judicata is clearly improper and erroneous under existing Fifth Circuit and United States Supreme Court precedent. In addition, the panel's conclusion that Hoffman was required to contest Landis' privity claim in the District Court despite Landis' failure to discharge its initial summary judgment burden, is clearly contrary to existing Fifth Circuit and United States Supreme Court law.

For these reasons, Petitioner Hoffman Controls Corporation prays that this Court grant petitioner's Petition for Writ of Certiorari and reverse the lower decisions.

Respectfully submitted,

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Attorney for Petitioner
Hoffman Controls Corporation

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11102

HOFFMAN CONTROLS CORPORATION,
Plaintiff-Appellant,

VS.

BURGESS-SAIA, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ORDER:

IT IS ORDERED that appellant's unopposed motion for extension of time to and including November 6, 1995, within which to file its Petition for Rehearing and Suggestion for Rehearing En Banc is DENIED.

/s/ JERRY E. SMITH
Jerry E. Smith
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 94-11102

HOFFMAN CONTROLS CORPORATION,
Plaintiff-Appellant,

VS.

BURGESS-SAIA, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas (3:92-CV-2122-R)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[1]

Hoffman Controls, Inc, ("Hoffman"), appeals a summary judgment in favor of Burgess-SAIA, Inc., and Landis & Gyr, Inc. Finding Hoffman's claims barred by res judicata, we affirm.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Hoffman manufactures heating, ventilating, and air conditioning devices. Two of its products, the 201-5A and 201-7A actuators, require specialized gearbox assemblies. In 1983, Landis began supplying Hoffman with two specialized gearbox assemblies manufactured by Burgess. The two assemblies were the Ba gearbox, which Hoffman used in the 201-5A actuator, and the F gearbox, which Hoffman used in the 201-7A actuator. In 1987, Burgess merged with SAIA and replaced Landis as Hoffman's supplier.

Beginning in 1989, Hoffman's customers began to return an increasing number of failed 201-5A actuators. Hoffman blamed the failures on the inability of the Ba gearboxes to stall continuously without failure, a feature Hoffman required in its agreement with Landis and Burgess. Hoffman filed a claim in state court against Burgess seeking damages for the faulty gearboxes, alleging they were defective. Hoffman did not specify whether the defective models belonged to the Ba or F series.

Burgess retorted with a counterclaim for payment on a 1990 invoices for 500 F series gearboxes. In response to the counterclaim, Hoffman raised affirmative defenses of breach of warranty and breach of contract resulting from defective gearboxes.

At trial, Hoffman dismissed its original claim without prejudice. It failed to submit a sworn denial to the counterclaim and was therefore barred by Texas law from raising its affirmative defenses. Burgess prevailed on the counterclaim.

Subsequently, Hoffman filed this claim in federal court against both Landis and Burgess, alleging only that the Ba gearboxes were defective. The district court granted summary judgment on the ground that the state court action was res judicata with respect to this claim. We reversed (*"Hoffman I"*), instructing the district court to take a closer look at the facts to determine whether the two claims arose from the same transac-

tion or occurrence under the standard of *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). On remand, the district court applied our instructions and granted summary judgment for the defendants.

II.

The question before us is the narrow one of whether the state court counterclaim and this claim involve the same transaction under the *Barr* standard. *Hoffman I* resolved most of the issues in this case and remanded solely for application of *Barr*. We therefore need consider only those arguments that address the application of the *Barr* test. Applying *de novo* review, *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992), we affirm.

In *Barr*, the court adopted the transactional approach to claims preclusion set forth in the Restatement of Judgments. Under that approach, the determination that two claims arise from the same transaction "is to be made pragmatically, 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.' " *Barr*, 837 S.W.2d at 631 (quoting from RESTATEMENT OF JUDGMENTS § 24(2)).

Under *Barr*, this claim and Burgess's state court counterclaim do involve the same transaction. It is true that the counterclaim involved only F gearboxes, while this action involves only Ba gearboxes. Hoffman's purchase of F gearboxes, however, was closely related to its purchase of Ba gearboxes: Hoffman negotiated to purchase both types of gearboxes at the same time.

Though technically different, the gearboxes performed substantially the same function. The parties treated both gearboxes as a single production throughout their relationship; Hoffman

treated both as a single product in the state court litigation by failing to distinguish them in its complaint. We conclude that res judicata bars Hoffman's action because it involves the same transaction as the state court counterclaim.

Hoffman contends that even if res judicata bars its suit against Burgess, it may still maintain an action against Landis, which was not a party to the state court suit. The district court nonetheless found that Landis could benefit from the claim-preclusive effect of Burgess's counterclaim because it was in privity with Burgess. Hoffman did not contest Landis's claim of privity in the district court and therefore cannot raise this issue on appeal. *See Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980) (holding that appellate court will not consider issue not raised in trial court); *Bliss v. Equitable Life Assurance Soc'y*, 620 F.2d 65, 70 (5th Cir. 1980); *Excavation & Erectors, Inc. v. Bullard Eng'rs, Inc.*, 489 F.2d 318, 320 (5th Cir. 1973) (same).

Hoffman contends that it had no duty to contest Landis's privity argument because that argument was "immaterial and irrelevant to any issue raised in [Landis's] Motion For Summary Judgment." Hoffman, however, points to no legal authority holding that a party may choose to ignore an argument it deems "immaterial and irrelevant" without waiving its right to contest the issue later. Even if Hoffman's position were correct, Landis's privity was a material and relevant issue, as it is only through privity that Landis could benefit from the state court judgment. We therefore conclude that the state court action precludes Hoffman from maintaining a claim against either Landis or Burgess.

AFFIRMED. *October 2, 1995*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOFFMAN CONTROLS CORPORATION,	
VS.	3:92-CV-2122-R
BURGESS-SAIA, INC., LANDIS & GYR, INC. AND SAIA SWITZERLAND	

JUDGMENT

For the reasons stated in this Court's Memorandum Opinion, final judgment is entered in favor of the Defendants, Burgess-SAIA, Inc., Landis & Gyr, Inc. and SAIA Switzerland, with costs taxed against Plaintiff, Hoffman Controls Corporation.

ENTERED: NOVEMBER 9, 1994

/s/ JERRY BUCKMEYER
Jerry Buchmeyer, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOFFMAN CONTROLS CORPORATION,	
VS.	3:92-CV-2122-R
BURGESS-SAIA, INC., LANDIS & GYR, INC. AND SAIA SWITZERLAND	

MEMORANDUM OPINION AND ORDER

Now before this Court are the Motions for Summary Judgment filed by Defendants Burgess-SAIA, Inc., and Landis & Gyr on the issue of res judicata, and the Motions for Partial Summary Judgment filed by Defendants Burgess-SAIA, Inc., and Landis & Gyr, on the issue of the applicability of the statute of limitations.

FACTUAL BACKGROUND

This case arose from defects in motor gearbox assemblies ("motors") sold by Defendants to Hoffman Controls Corporation ("Hoffman"). Hoffman is involved in the design and manufacture of mechanical controls, including the manufacture of variable air control units. SAIA-AG manufactures motors in Switzerland. Initially, SAIA-AG was represented in the United States by Landis & Gyr, Inc. ("Landis & Gyr"). In 1986, SAIA, Inc., an English company, bought SAIA-AG from its parent company. In 1987, SAIA, Inc. purchased Landis & Gyr's industrial components division pursuant to an Asset Purchase Agreement, thereby acquiring the right to distribute SAIA products. SAIA, Inc. later merged with Burgess Holdings PLC to form Burgess-SAIA, Inc. ("Burgess"). Thereafter Burgess distributed SAIA products throughout the United States.

In the early 1980's, Hoffman began inquiring about motors that had the capability of maintaining a stalled condition. SAIA, through its U.S. representatives, recommended two types of motors: a "Ba" series and an "F" series. Both needed special adjustments to meet Hoffman's requirements. On or about June 3, 1983, Landis & Gyr sent to Hoffman five Ba series and five F series sample motors manufactured by SAIA. Hoffman personnel tested these units, and around September 20, 1983, Hoffman issued a purchase order for 500 Ba and 500 F series motors. This purchase order indicated that Hoffman required a motor "capable of stall in both directions without failure." At the end of 1983, both the Ba series and the F series were field tested.

After the field tests, representatives of Hoffman and SAIA correspondence and met several times to discuss mechanical specifications and pricing on both the Ba and F series. Sometime in 1984 or 1985, Hoffman began production of air control units with SAIA motors. Hoffman incorporated the Ba series motor into its 201-5A actuator, and the F series motor into its 201-7A actuator. In 1989, Hoffman noticed a trend of failures in its 201-5A actuators, and traced the cause to a defect in the Ba motor gearbox assemblies. Hoffman has experienced no problems with actuators containing F series motor gearbox assemblies.

On July 19, 1991, Hoffman filed suit against Burgess in Texas state court, alleging breach of contract and breach of warranty claims. The complaint did not specify which series was allegedly defective. Burgess counterclaimed for payment on a December 20, 1990 invoice for delivery of 500 F motor gearbox assemblies. In its answer to Burgess's counterclaim, Hoffman raised breach of contract and breach of warranties as affirmative defenses. On the day of trial, October 1, 1992, Hoffman dismissed its claims without prejudice. The state court found for Burgess on its counterclaim, based on Rule 185 of the Texas Rules of Civil Procedure. In short, Burgess had submitted a sworn account, to which Hoffman did not respond with a sworn denial. This failure

to submit a sworn denial prevented Hoffman from contesting the validity of Burgess's claim, and judgment was entered for Burgess.

On October 19, 1992, Hoffman filed the present action against Burgess and Landis & Gyr in federal district court. Hoffman claims breach of contract, breach of warranty, misrepresentation, violation of the Texas Deceptive Trade Practices Act, fraud, violation of the Uniform Commercial Code, and fraudulent concealment. Hoffman contends that all of its claims arise from the defective Ba series motors, not the F series.

Burgess and Landis & Gyr moved for summary judgment on the grounds that Hoffman's claims were barred by the doctrine of res judicata. This court granted their motion, on the theory that Hoffman's claims arose from the same "transaction or occurrence" as the prior action adjudicated in state court. Hoffman appealed this Court's decision, and the Fifth Circuit reversed and remanded, instructing this court that a grant of summary judgment on the ground of res judicata must contain a closer look at the facts to determine whether the second claim arises from the same "transaction or occurrence" as the first. Burgess once again moves for summary judgment, on the same grounds raised earlier.

ANALYSIS

Res Judicata

Res judicata, or claim preclusion, bars the relitigation of a cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been turned in a prior suit.[2] Under the doctrine of claim preclusion, a subsequent suit having an identity of parties, issues, and subject matter

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[2] *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627,628 (Tex. 1992); *Gracia v. RC Cola-7-UP Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

merges into the final judgment in the prior suit.[3] Claim preclusion embodies policies reflecting the need to bring all litigation to an end, and prevent vexatious litigation and double recovery, maintain the stability of court decisions, and promote judicial economy.[4] To advance these policies, claim preclusion prohibits a party from splitting a cause of action.[5]

When applying the doctrine of res judicata, the federal court should look to the effect that a Texas state court would give to a prior Texas state court judgment.[6] The Supreme Court of Texas, in *Barr v. Resolution Trust Corporation*, reaffirmed the "transactional" approach to claim preclusion. A final judgment in a prior action will bar a subsequent suit on the transaction, or series of connected transactions, out of which the prior action arose.[7] The determination of whether res judicata is applicable is similar to the determination of whether the subsequent claim can be characterized as a compulsory counterclaim.[8] Rule 97 of the Texas Rules of Civil Procedure defines a compulsory counterclaim as any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[9] The Restatement of Judgments provides that in determining what constitutes a transaction, courts should give weight to "whether the facts are related in time, space, origin, or motivation, whether they form a

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[3] *Bonniwell*, 663 S.W.2d at 818 (citing *Texas Water Rights Comm's v. Crow Iron Works*, 582 S.W.2d 768, 771 (Tex. 1979)); *Abbott Lab. v. Gravis*, 470 S.W.2d 639, 642 (Tex 1971).

[4] *Barr*, 837 S.W.2d at 629.

[5] *Id.*

[6] *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991).

[7] 837 S.W.2d at 631.

[8] *See*, Tex. R. Civ. P. 97.

[9] 837 S.W.2d at 630. *See* Tex. R. Civ. P. 97(a).

convenient trial unit. and whether their treatment as a trial unit is consistent with the parties' expectations or business understanding or usage."[10] Thus, in determining whether the present suit is precluded, this Court must examine the factual basis of the claim in the prior litigation and determine whether the present claims arise from the same transaction or series of transactions.[11]

Plaintiffs argue that because the prior litigation involved an invoice for F series motors, while the present litigation involves alleged defects in the Ba series, the facts are completely unrelated, and res judicata should not apply. Defendants counter that the business relationship between Hoffman and Burgess has always involved both the Ba and F series motors, and to say that the two are unrelated is a mischaracterization. According to defendants the business dealings involving the Ba and F series were so intertwined that they constitute a related series of transactions, to which res judicata should apply.

In deciding the appeal of this Court's first grant of summary judgment, the Fifth Circuit expressed misgivings about our "lack of concern with the underlying facts of the dealings between Burgess and Hoffman."[12] On remand, the Fifth Circuit instructed this Court to "more carefully and specifically examine how — if at all — transactions spanning over many years and involving different series of gearbox assemblies are so related as to constitute the same transaction for res judicata purposes."[13]

Thus, the decision of this Court rests on how widely or narrowly we define the scope of the transaction, based on the relatedness of the facts underlying both claims. In the first state

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[10] *Id.* at 631 (quoting Restatement of Judgments § 24(2)).1

[11] *Id.* at 630.

[12] *Hoffman v. Burgess-SAIA*, No. 93-1775, slip op. at 6 (5th Cir. filed Apr. 15, 1994).

[13] *Id.* at 7.

court action, Burgess counterclaimed for payment for a shipment filling Purchase Order 8922. This purchase order was for 500 F series motors. We can trace the "origin" of Purchase Order 8922 all the way back to June 3, 1983, when Landis & Gyr sent to Hoffman five Ba series and five F series sample motors. These two products made up the entirety of the business relationship between Hoffman and Burgess. Since that time, Hoffman, SAIA, and SAIA's U.S. representatives had engaged in ongoing discussions and negotiations about Ba and F series mechanics, specifications and pricing. No evidence has been presented that these discussions pertained solely to either Ba or F series motors. Rather, deposition testimony indicates that meetings were held to discuss specifications or pricing of the Ba and F series together.

While the mechanical structure and specifications of the two series may have been different,[14] they performed the same function. They may be compared to two pairs of eyeglasses, each with different prescriptions and frames, but both created at the request of one customer, with that customer's input as to design and pricing. If we allowed Hoffman to defend a suit as to one (the F series), and then later bring a suit as to the other (the Ba series), it would be similar to allowing a customer to bring separate suits for his two pairs of eyeglasses. Claim preclusion exists specifically to prevent such splitting of claims.[15]

The pleadings in the state court case are also evidence of the parties expectations, another consideration mentioned in *Barr* to

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[14] The differences between the two motors was as follows: The transmission ratio for the Ba series was 1,800 to 1, and 4000 to 1 for the F series. The running torque was represented to be 162 OZ-IN for the Ba series, and 283 OZ-IN for the F series. The Ba series incorporated a combination of plastic and metal gears, while the F series utilized only metal gears. The expected life of the F series was represented to be much greater than the Ba series.

[15] *Barr,* 837 S.W.2d at 629.

be used in determining what constitutes a transaction.[16] Hoffman asserted breach of contract and breach of warranty as affirmative defenses against Burgess's counterclaim. From this pleading strategy, it is reasonable to infer that the treatment of the entire course of dealing on the Ba and F Series as a Series as a convenient trial unit was within the expectations of the parties in the case. The Fifth Circuit has warned this Court that "[w]hether Hoffman's claims asserted in state court were compulsory or permissive counterclaims cannot, in other words, be determined solely by Hoffman's pleading strategy.[17] However, this warning does not prevent the consideration of Hoffman's pleading strategy as *one* of the factors enunciated in *Barr*.

Thus, considering the close relationship between Ba and F series in the dealings between Hoffman and Burgess, the convenience of treating the claims as a convenient trial unit, and the parties' expectations, as evidenced by their pleading strategies, this court finds that Hoffman's claims arise from the same transaction, or series of transactions, out of which Burgess' state court counterclaims arose. Thus, the present claims are barred by the doctrine of res judicata and Burgess's Motion for Summary Judgment is hereby GRANTED.

Res judicata is applicable to parties to the original action, and to their privies as well.[18] While Burgess was a party to the state court action, Landis & Gyr was not. Thus, they are only protected by the res judicata effect of the previous adjudication if they were in privity with a party to that case. Landis & Gyr asserts that it is in privity with Burgess, and therefore entitled to

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[16] *Id.* at 631.

[17] *Hoffman v. Burgess-SAIA*, No. 93-1775, slip op. at 6.

[18] *Getty Oil Co. v Insurance Co. of N. Am.*, 845 S.W.2d 794,800 (Tex. 1992), *cert. denied, Youell & Cos. v. Getty Oil Co.* 126 L.Ed.2d 45, 114 S.Ct. 76 (1993).

summary judgment as well. Hoffman does not contest the claim of privity.

Those who are in privity with a party may include persons whose interests are represented by the party, successors in interest, and persons who exert control over the action.[19] Because Landis & Gyr's Industrial Control Division was sold to SAIA, Inc. under an Asset Purchase Agreement, and SAIA, Inc. merged with Burgess Holdings PLC to form Burgess-SAIA, Inc., Landis & Gyr's interests were adequately represented by Burgess. Thus, Landis & Gyr and Burgess are in privity, and Hoffman's claims against Landis & Gyr are barred by res judicata as well. Landis & Gyr's Motion for Summary Judgment is hereby GRANTED.

Statute of Limitations

Both Burgess and Landis & Gyr argue that they are entitled to partial summary judgment because some of Hoffman's causes of action are barred by applicable statutes of limitations. Because all of Hoffman's claims have been barred by res judicata, this Court does not reach the statute of limitations question presented by Defendants' Motions for Partial Summary Judgment.

SIGNED this 9th day of November, 1994.

/s/ JERRY BUCKMEYER
Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

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[19] *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 773-74 (Tex. 1983).

NO. 91-8513-B

HOFFMAN CONTROLS CORPORATION, *Plaintiff,* VS. BURGESS-SAIA, INC., *Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 44TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on for trial before the Court without a jury on October 1, 1992. Plaintiff Hoffman Controls Corporation and Defendant Burgess-SAIA, Inc. appeared through their respective attorneys of record. After considering the pleadings, the evidence, and the arguments of counsel, the Court, in response to a request from the Defendant, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On October 1, 1992 this case was called to trial as regularly scheduled.

2. Before the close of the Plaintiff's evidence, the Plaintiff took a nonsuit of its case without prejudice pursuant to Rule 162 of the Texas Rules of Civil Procedure.

3. Following the Plaintiff's nonsuit, the Court heard the Defendant's counterclaim.

4. Defendant's counterclaim is founded upon an open account pursuant to Rule 185 of the Texas Rules of Civil Procedure for goods, wares, and merchandise.

5. The Plaintiff did not timely file a written denial of the sworn account under oath.

6. Defendant's counterclaim was actually litigated and finally adjudicated on the pleadings.

7. On or about November 6, 1990, plaintiff ordered from defendant certain personal property consisting of 500 motor gear box assemblies.

8. On or about December 20, 1990, Defendant delivered and Plaintiff received, all of the above-described motor gear box assemblies.

9. The reasonable cash market value of the motor gear box assemblies in Dallas County, Texas, on the day of delivery was $10,025.00, and said amount is the usual and customary amount charged by the Defendant for said assemblies.

10. The price the Plaintiff agreed to pay for the motor gear box assemblies was $10,025.00.

11. The defendant kept a systematic record on the above-described transaction on the Plaintiff's account. The amount due and owing on the account after all just and lawful offsets, payments and credits have been allowed is $10,025.00.

CONCLUSIONS OF LAW

1. Defendant is entitled to judgment against the Plaintiff.

2. The Plaintiff is indebted to the Defendant for the sum of $10,025.00 for actual damages.

3. The Plaintiff is indebted to the Defendant for the sum of $550.40 for prejudgment interest.

4. The indebtedness of the Plaintiff to the Defendant shall bear interest at the rate of 10 percent per annum from October 9, 1992, until paid.

5. The Plaintiff shall pay all costs of Court expended or incurred in this cause.

Signed this 2nd day of November, 1992.

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HON. CANDACE TYSON

NO. 91-8513-B

HOFFMAN CONTROLS CORPORATION, *Plaintiff,* VS. BURGESS-SAIA, INC., *Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 44TH JUDICIAL DISTRICT

JUDGMENT

On the 1st day of October, 1992, came on to be heard the above-entitled and numbered cause. Plaintiff Hoffman Controls and Defendant Burgess-SAIA, Inc. appeared through their respective attorneys of record. No jury having been demanded, all questions of fact were submitted to the Court.

The Court, having considered the Plaintiff's request to take a Non-Suit before the close of the Plaintiff's evidence, finds that the request should be granted. The Plaintiff's claims are, therefore, non-suited without prejudice pursuant to Rule 162 of the Texas Rules of Civil Procedure.

The Court then considered the Defendant's Counterclaim for affirmative relief. After considering the pleadings on file and the arguments of counsel, the Court is of the opinion that the Defendant is entitled to recover of and from the Plaintiff on Defendant's Counterclaim the sum of $10,025.00.

IT IS THEREFORE ORDERED that Burgess-SAIA, Inc. have and recover actual damages from Hoffman Controls Corporation the sum of Ten Thousand Twenty-five Dollars ($10,025.00), plus prejudgment interest, calculated at the rate of 6 percent per annum, in the amount of Five Hundred Fifty Dollars and 40/100 ($550.40).

IT IS FURTHER ORDERED that the Judgment here rendered shall bear interest at the rate of 10% from October 9, 1992, until paid. All costs of court expended or incurred in this cause are adjudged against Plaintiff, Hoffman Controls Corporation. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary. All other relief not expressly granted is denied.

SIGNED this 9th day of October, 1992.

/s/ CANDACE TYSON

HON. CANDACE TYSON

Rule 56. Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing and may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy and what material facts are actually and in good faith controverted. It shall

thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party

employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
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(2)

No. 95-1069

In The

Supreme Court of the United States

October Term, 1995

HOFFMAN CONTROLS CORPORATION,

Petitioner,

v.

BURGESS-SAIA, INC. AND LANDIS & GYR, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BURGESS-SAIA, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner has waived its claims against Burgess-SAIA, Inc. by failing to raise any questions contesting the application of *res judicata* to bar its claims against Burgess-SAIA, Inc.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

Hoffman Controls Corporation – Petitioner

Landis & Gyr, Inc. – Respondent

Burgess-SAIA, Inc. – Respondent

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Hoffman Controls Corporation ("Hoffman") designs and manufactures mechanical controls, primarily for heating and air conditioning systems. Burgess-SAIA, Inc. ("Burgess-SAIA") is a supplier of motor gearbox assemblies. Throughout the 1980's, Hoffman purchased motor gearbox assemblies from Landis & Gyr, Inc. ("Landis & Gyr"), and later from Burgess-SAIA, for use in Hoffman's mechanical controls.

On July 18, 1991, Hoffman filed suit against Burgess-SAIA, but not Landis & Gyr, in the 44th Judicial District Court of Dallas County, Texas; Cause No. 91-8513-B (the "State Court Action"). Hoffman alleged that motor gearbox assemblies supplied by Burgess-SAIA were failing because they were not capable of maintaining a continuous stalling condition. Specifically, Hoffman alleged that:

> The failure to maintain a continuous stalling condition makes the motor gearbox assemblies, as used in the application of Plaintiff's products, unacceptable, defective, and not within the specifications supplied by Plaintiff in the purchase order and agreement reached with Defendant.

(State Court Action – Plaintiff's Original Petition, ¶ 4.8, Tr. 70). The purchase order was for *both* Ba and F series gearboxes. (Tr. Vol. 5, p. 51). As a result of the alleged

defects in both the Ba and F series, Hoffman sought damages for breach of contract and breach of warranty. (State Court Action – Plaintiff's Original Petition, ¶ 3.1, Tr. 69).

Burgess-SAIA entered general and specific denials of the Plaintiff's Original Petition. In addition, Burgess-SAIA filed a Counterclaim in the State Court Action to recover $10,025 from Hoffman on an unpaid invoice for some of the same motor gearbox assemblies that Hoffman claimed were defective. (State Court Action – Defendant's Counterclaim, Tr. 82-88).

Hoffman did not file a sworn denial to Burgess-SAIA's Counterclaim. Instead, Hoffman "incorporate[d] by reference the allegations Plaintiff made against Defendant in Plaintiff's Original Petition and . . . raise[d] as defenses to Defendant's Counterclaim the causes of action which were alleged by Plaintiff in Plaintiff's Original Petition." (State Court Action – Plaintiff's Original Answer to Defendant's Counterclaim, ¶ III, Tr. 89-91).[1] In other words, the alleged defects in both the Ba and F series were raised as a defense to the Counterclaim in the State Court Action.

The State Court Action was called to trial on October 1, 1992. Following Hoffman's non-suit of its claims pursuant to Rule 162 of the Texas Rules of Civil Procedure, the state court entered Judgment for Burgess-SAIA on its

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[1] Although Hoffman represents to this Court that it did not contest Burgess-SAIA's claim for payment (Petition for Writ of Certiorari, p. 4), the record is clear that the claim was contested in the State Court Action. Indeed, Hoffman has never paid the invoice it now claims it does not contest.

Counterclaim for affirmative relief for $10,025, plus pre-judgment and post-judgment interest. (State Court Action – Judgment, Tr. 92-93).

The state court subsequently entered Findings of Fact and Conclusions of Law. (State Court Action – Findings and Conclusions, Tr. 94-96). The state court found, in significant part, that Burgess-SAIA's Counterclaim was founded upon an open account pursuant to Rule 185 of the Texas Rules of Civil Procedure for goods, wares and merchandise; that Hoffman did not timely file a written denial of the sworn account under oath; and that Burgess-SAIA's Counterclaim was actually litigated and finally adjudicated on the pleadings. (Findings and Conclusions, ¶¶ 4-6, Tr. 95).

Hoffman subsequently appealed the state court judgment. The parties submitted their appellate briefs and argued before the Texas Court of Appeals on October 26, 1993. While Hoffman's appeal of the State Court Action was still pending, Hoffman brought suit in the United States District Court for the Northern District of Texas ("the District Court") against both Burgess-SAIA and Landis & Gyr asserting claims relating to alleged defects in the motor gearbox assemblies. (Plaintiff's Original Complaint, Tr. 1-20).

Burgess-SAIA moved for a conditional summary judgment and stay in the federal action on the basis that the original state court judgment was *res judicata* to Hoffman's claims in the federal action. On August 2, 1993, the District Court stayed the proceedings pending a final resolution of Hoffman's appeal of the State Court Action. The District Court also determined that the doctrine of *res*

judicata would apply to bar Hoffman's entire federal court action if the original state court action was affirmed on appeal. (Memorandum Opinion and Order, Tr. 202-209).[2]

The District Court's Order was reversed and remanded by the Fifth Circuit on April 15, 1994. (Tr. 297-304). The Court of Appeals instructed the District Court to:

> . . . [m]ore carefully and specifically examine how – if at all – transactions spanning over many years and involving different series of gearbox assemblies are so related as to constitute the same transaction for *res judicata* purposes.

(Tr. 304).

As a consequence, Burgess-SAIA filed its second Motion for Summary Judgment on June 30, 1994 to satisfy the instructions of the Fifth Circuit. (Tr. Vol. 5).[3] After careful consideration, the District Court granted Burgess-SAIA's second Motion for Summary Judgment on November 10, 1994. The District Court's Memorandum Opinion and Order specifically addressed the concerns of the Fifth Circuit by demonstrating that the dealings

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[2] The state court judgment in favor of Burgess-SAIA was later affirmed on appeal by the Texas Court of Appeals. (Tr. 213-225). On December 8, 1994, the Texas Supreme Court denied Hoffman's Petition for Writ of Error.

[3] Contrary to Petitioner's claim, (Petition for Writ of Certiorari, p. 4, n.5) *both* Landis & Gyr *and* Burgess-SAIA moved for summary judgment based on the statute of limitations. (Tr. 309). The District Court did not reach those motions. (Tr. 716).

between Hoffman and Burgess-SAIA constituted a single transaction for *res judicata* purposes. As a result, the District Court entered a final judgment in favor of Burgess-SAIA.[4] (Tr. 717). Hoffman then perfected its second appeal to the Fifth Circuit.

After briefing and oral argument, a panel of the Fifth Circuit affirmed the judgment of the District Court in favor of Burgess-SAIA and Landis & Gyr on October 2, 1995. Hoffman's Petition for Rehearing and Suggestion for Rehearing En Banc was denied as untimely. As a result, Hoffman filed its Petition for Writ of Certiorari on December 29, 1995.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. Hoffman Has Not Challenged the Judgment in Favor of Burgess-SAIA.

The questions presented by Hoffman's Petition for Writ of Certiorari challenge the lower courts' determination that Landis & Gyr was in privity with Burgess-SAIA for *res judicata* purposes. Hoffman never contests the application of *res judicata* as a bar to its claims against

[4] Judgment was also entered in favor of Landis & Gyr on the theory that although Landis & Gyr was not a party to the State Court Action, it was in privity with Burgess-SAIA for purposes of *res judicata*. Hoffman did not contest Landis & Gyr's privity claim at the District Court level.

Burgess-SAIA, however.[5] Instead, Hoffman simply claims: (a) that Landis & Gyr failed to discharge its initial burden under Rule 56 of the Federal Rules of Civil Procedure; (b) that Hoffman was not required to contest Landis & Gyr's claim of privity at the District Court level; and (c) that Landis & Gyr failed to establish *res judicata* privity as a matter of law. (Petition for Writ of Certiorari, p. i). Consequently, there is nothing to review in connection with the claims against Burgess-SAIA.

Hoffman's failure to present any questions concerning the judgment in favor of Burgess-SAIA waives those claims. Only issues raised by the Petition for Certiorari are typically considered by this Court. *Phillips Chemical Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 386 n.12, 80 S. Ct. 474, 481 (1960). Consequently, there can be no challenge to the application of *res judicata* to the claims against Burgess-SAIA.

2. There is No Compelling Reason to Grant Certiorari.

Hoffman does not state any compelling reasons supporting the grant of certiorari in this case. Hoffman simply disagrees with the Fifth Circuit's application of well-settled principles to the unusual facts of its case. The

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[5] Although it is apparent from the face of the Petition that Hoffman no longer has an interest in pursuing its claim against Burgess-SAIA, Hoffman has failed to clearly notify the Court, pursuant to Rule 12(6) of the Rules of the Supreme Court of the United States, that Burgess-SAIA does not have an interest in the outcome of the Petition. Consequently, Burgess-SAIA has filed this brief.

Court should not invest its limited resources on such a case.

To begin with, *res judicata* is a well-settled principle of Texas law that does not require the time of this Court. *Texas Water Rights Comm'n v. Crow Ironworks*, 582 S.W.2d 768 (Tex. 1979). Hoffman does not contest the rule of law or its operation as a complete defense in this case.

Similarly, although Hoffman may contest the application of the facts of this case to Landis & Gyr's legal arguments, it does not seriously contest the principle that *res judicata* is available both to parties to the State Court Action and those in privity with them. *Id.* Although Hoffman now claims that Landis & Gyr did not make the required factual showing of privity, Hoffman failed to raise the privity issue in the District Court. Failure to raise this issue at the District Court bars Hoffman from raising the issue on appeal. *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980).

Finally, the Rule 56 issues raised by Hoffman have been well-settled since 1986. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). There is no benefit to revisiting those standards, particularly in a case with the unusual procedural history of this one.

CONCLUSION

Certiorari should be denied. In the alternative, Hoffman should not be permitted to pursue any claims against Burgess-SAIA in light of the absence of any issues raised in the Petition for Writ of Certiorari that contest Burgess-SAIA's judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HOFFMAN CONTROLS CORPORATION,
Petitioner,

v.

BURGESS-SAIA, INC. and LANDIS & GYR, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT LANDIS & GYR, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.1

This brief is filed on behalf of Landis & Gyr, Inc., whose parent company is Landis & Gyr AG, and who has no subsidiaries (excluding wholly-owned subsidiaries).

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No. 95-1069

IN THE

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OCTOBER TERM, 1995

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v.

BURGESS-SAIA, INC. and LANDIS & GYR, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT LANDIS & GYR, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Hoffman Controls Corporation ("Petitioner") is a Dallas, Texas, company which designs and manufactures mechanical controls for heating and air conditioning units. From 1983 until March 23, 1987, the Industrial Components Division of Respondent Landis & Gyr, Inc. ("L&G"), then a wholly-owned subsidiary of Landis & Gyr AG, a Swiss corporation, was the United States distributor of motor gearbox assemblies manufactured in Switzerland by L&G's sister subsidiary SAIA AG, which was also a Swiss corporation. In December

1986, Landis & Gyr AG sold SAIA AG to an English company, SAIA, Inc.; on March 23, 1987, L&G in turn sold its Industrial Components Division to SAIA, Inc., pursuant to an "Asset Sale Agreement Dated As Of March 23, 1987, between Landis & Gyr, Inc. and SAIA Inc." In 1989, SAIA, Inc., merged with a British company, British Holdings PLC, to form respondent Burgess-SAIA, Inc. ("Burgess"). (L&G Motion for Summary Judgment, Exs. A-D, Tr. Vol. 2, pp. 405-437.)

Beginning in 1983 and continuing throughout the 1980's, Petitioner purchased from L&G—and later from Burgess—two models (Ba and F) of motor gearbox assemblies, specially modified at Petitioner's order, to be used in Petitioner's mechanical controls. Neither L&G nor Burgess ever sold any other products to Petitioner.

On July 18, 1991, Petitioner filed suit against Burgess in the 44th Judicial District Court of Dallas County, Texas, alleging breach of contract and warranty with respect to the motor gearboxes. (Plaintiff's Original [state court] Petition, ¶ 4-8, Tr. Vol. 1, p. 70.) Specifically, Petitioner complained that the gearboxes did not comply with the specifications of Petitioner's original September 20, 1983, purchase order for the Ba and F gearboxes. (Purchase Order, Tr. Vol. 5, p. 51.) Following Texas procedure, Burgess entered general and specific denials of Petitioner's complaint allegations and, in addition, filed a sworn counterclaim for $10,025 owed on an unpaid invoice for motor gearboxes delivered in December 1990. (Counterclaim, Tr. Vol. 1, pp. 82-88.) Petitioner failed to file a sworn denial to Burgess' counterclaim. It did file an unsworn answer, incorporating by reference as its affirmative defenses to the counterclaim the allegations of its underlying complaint. (Plaintiff's Original

Answer, Tr. Vol. 1, pp. 89-91.) Petitioner's state court action was called to trial on October 1, 1992. After the court denied its request for a continuance of the trial, Petitioner took a nonsuit.

Burgess, however, did not dismiss its counterclaim on October 1, 1992, and the Texas court entered judgment on the pleadings in Burgess' favor, finding that Burgess had proved an open account under Texas Rule of Civil Procedure 185; that Petitioner had not timely filed a sworn written denial of the sworn account and could therefore offer no evidence as to any defense or affirmative defense; and that Burgess' counterclaim was actually litigated and finally adjudicated on the pleadings. (Pet. Appendices A-5-1 *et seq.* and A-6-1 *et seq.*)

Petitioner appealed the state court judgment. The judgment was ultimately affirmed.[1] Meanwhile, on October 19, 1992, while the state court appeal was pending, Petitioner filed this action in the United States District Court for the Northern District of Texas. (Plaintiff's Original Complaint, Tr. Vol. 1, pp. 1-20.) In its federal court suit, Petitioner, who this time sued L&G and SAIA, Inc.[2] as well as Burgess, again alleged defects in the motor gearboxes it had purchased from L&G and Burgess.[3] Contrary to Petitioner's implication (Pet. at 4),

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[1] *Hoffman Controls Corp. v. Burgess-SAIA, Inc.*, 1994 WL 60873 (Tex. App. - Dallas).

[2] Petitioner never served SAIA, Inc. with summons and complaint.

[3] Petitioner claims (Pet. at 3) that it only learned the "cause" of the alleged failures of the Ba gearboxes in October 1990 when its engineer performed life tests on the units. In fact,

(continued...)

L&G in its initial answer and thereafter repeatedly denied that it had misrepresented or otherwise acted wrongfully with respect to the special-order product it distributed for Petitioner's testing, approval and eventual purchase in production quantities.

Asserting that Petitioner's federal court claims were barred by the *res judicata* effect of the state court judgment, Burgess moved for a conditional summary judgment and stay of proceedings pending the state court appeal. On August 2, 1993, the district court granted the requested stay, on the ground that *res judicata* would bar Petitioner's entire federal court action if the state court judgment were affirmed on appeal. (Memorandum Opinion and Order, Tr. Vol. 1, pp. 202-209.)

Petitioner appealed the district court's stay order, and on April 15, 1994, the Fifth Circuit Court of Appeals reversed, instructing the district court to

> . . . [m]ore carefully and specifically examine how—if at all—transactions spanning over many years and involving different series of gearbox assemblies are so related as to constitute the same transaction for *res judicata* purposes.

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[3] (...continued)
Petitioner's representatives testified that the gearboxes had been repeatedly tested: in 1983, samples were tested; in 1984, the special-order gearboxes were distributed for field tests; in 1985, stall tests were run on the gearboxes; every product received was tested; tests on both models of gearboxes went on "continuously"; and all returns were analyzed for malfunction. (Burgess' Motion for Summary Judgment, Undisputed Facts, ¶¶ 14, 17, and 18, Tr. Vol. 5, p. 6; Byrnes Dep., Tr. Vol. 3, pp. 559-62; Bowman Dep., Tr. Vol. 3, pp. 564-66; Byrnes Affidavit, ¶ 13, Tr. Vol. 7, p. 113; Bowman Affidavit, ¶ 11, Tr. Vol. 7, p. 107.)

(Fifth Circuit Judgment and Memorandum Opinion and Order, Tr. Vol. 2, p. 304.)

In response to the Fifth Circuit's concerns, on June 30, 1994, Burgess filed a second motion for summary judgment based on *res judicata*, which provided even more factual proof of the nature of the parties' transaction. On July 1, 1994, L&G filed its own motion for summary judgment asserting the *res judicata* effect of the judgment entered in favor of its privy, Burgess.[4] In its response to L&G's motion for summary judgment, Petitioner did not contest the fact or effect of the privity of contract and successor relationship between Burgess and L&G. (Tr. Vol. 7, pp. 1-116.) Petitioner did not list any disputed facts or issues of law relating to privity, although Federal Local Court Rule 5.2(a) for the U.S. District Court of Texas requires in pertinent part:

> The responses to a motion for summary judgment shall list in numerical order (i) the disputed facts upon which the response relies and (ii) the issues of law.

Further, prior to July 1, 1994, when Petitioner filed its second amended complaint, which alleged that Respondents had breached their contract and warranties by selling allegedly defective Ba, but *not* defective F, gearboxes, all of Petitioner's complaints claimed defects generally in all gearboxes provided and asserted breach of the original September 20, 1983, purchase order for both special

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[4] Simultaneously, L&G filed a motion for summary judgment on all counts based on the applicable statutes of limitation, and Burgess filed a motion for partial summary judgment based on the statutes of limitations. The district court opinion of November 9, 1994 (Pet. Appendix at A-4-8), incorrectly states that L&G's motion was for partial summary judgment.

order models. It was only after the district court's first determination that Petitioner's federal action was barred by *res judicata* that Petitioner began to assert that only the Ba gearboxes had failed.[5]

On November 9, 1994, the district court granted both Burgess' and L&G's motions for summary judgment, specially addressing the concerns of the Fifth Circuit and finding that the dealings between Hoffman, Burgess, and L&G constituted a single transaction for *res judicata* purposes. In its opinion, the district court, noting that Petitioner "does not contest [L&G's] claim of privity," nevertheless examined the record and affirmatively found that L&G and Burgess were in privity for *res judicata* purposes because Burgess adequately represented its predecessor's interests in connection with the state court litigation. (Pet. Appendix at A-4-8.) The district court thus entered final judgment in favor of both Burgess and L&G.

Petitioner again appealed.

As to its failure to contest any fact or advance any argument as to the existence or legal effect of L&G's and Burgess' privity, Petitioner belatedly made new arguments—both procedural and substantive—to the Fifth Circuit. First, Petitioner argued that *res judicata* could

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[5] Petitioner's new-found assertion flew in the face of its own prior state court affirmative defense to Burgess' counterclaim, in which Petitioner pled that it did not owe Burgess the $10,025 because the invoiced product—F gearboxes only—was defective. Petitioner's argument was also controverted by the testimony of its own president, who at deposition admitted that his company had sued for damages relating to the F, as well as the Ba, gearboxes because it feared the F model would imminently "fail" too. (Tr. Vol. 3, p. 586.)

never be invoked by L&G because L&G was not a party to the state court suit and had no standing to plead *res judicata*. Second, and only in its reply brief, Petitioner argued that L&G's uncontroverted and uncontrovertible factual proof of its asset sale to Burgess' predecessor and merger partner did not amount to a "material" fact relating to privity and therefore Petitioner was not obliged under Rule 56 to respond to it.

The Fifth Circuit affirmed. It held that because Petitioner had not raised the privity issue in the court below, it had waived it on appeal. Noting that privity is plainly material to L&G's entitlement to raise the *res judicata* effect of Burgess' judgment, the court summarily dispensed with plaintiff's Rule 56-based argument.

Petitioner's present Petition to this Court followed.

SUMMARY OF THE ARGUMENT

Petitioner, who evidently attacks only that portion of the Fifth Circuit's opinion that relates to affirmance of summary judgment for L&G, demonstrates no basis upon which this Court's certiorari jurisdiction may be invoked. Rule 10 of the Rules of the Supreme Court of the United States sets forth the bases for a grant of certiorari. First, such discretionary review is available to resolve a conflict among the federal courts of appeals and the state courts. This is "[a] principal purpose for which [the Court] use[s] [its] certiorari jurisdiction . . . ." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Second, a petition for certiorari may be granted where there are "special and important" policy reasons for the Court to decide an unsettled question of federal law. "But this Court does not sit to satisfy a scholarly interest . . . . [or] for the benefit of the par-

ticular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Third, certiorari may be granted where the appellate court has decided a federal question that conflicts with this Court's established decisions.

Petitioner here cannot and does not claim that a conflict or an important policy issue exists with respect to this case. Petitioner's contention, that the Fifth Circuit deviated from established law by deeming Petitioner to have waived any argument as to privity between L&G and Burgess, is simply wrong. Numerous Fifth Circuit cases over at least the past several decades have stated and applied the waiver rule. The Fifth Circuit's affirmance of summary judgment for L&G also fully comports with the law relating both to Rule 56 procedure and to the nature of the privity that entitles a non-party to invoke the *res judicata* effect of a judgment entered as to its privy.

ARGUMENT

I. BECAUSE THE FIFTH CIRCUIT'S DECISION FULLY COMPORTS WITH ESTABLISHED LAW, PETITIONER DEMONSTRATES NO BASIS FOR CERTIORARI IN THIS CASE.

Petitioner's apparent Rule 10 basis for certiorari is its claim that the Fifth Circuit improperly held that Petitioner waived its right to raise the privity issue. (Pet. at 6.) As noted above, the Fifth Circuit has repeatedly stated and applied the rule that an issue not raised below is not preserved for appeal. The waiver rule encompasses both factual evidence and legal theories and has been applied in the context of summary judgment motions. *See, e.g., Haubold v. Intermedics, Inc.*, 11 F.3d

1333, 1336 (5th Cir. 1994) (factual arguments of employees seeking severance pay were waived where they were not raised in response to employer's motion for summary judgment); *McLean v. International Harvester Co.*, 902 F.2d 372, 374 (5th Cir. 1990) (appellate court could not consider plaintiff's claim for indemnification for suit expenses where issue had not been raised in district court); *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988) (defendant who had not disputed plaintiff's summary judgment affidavits in the district court could not, for the first time, dispute the physical placing of plaintiff's mechanic's lien on appeal); *Gabel v. Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988) (*pro se* appellant's claims not presented to district court would not be considered on appeal: "we are a court of errors and appeals; and the trial court cannot have erred as to matters which were not presented to it"); *Vaughner v. Pulito*, 804 F.2d 873, 878 n.2 (5th Cir. 1986) (appellate court would not consider plaintiff's Unfair Trade Practices and Consumer Protection Act claim where claim was not asserted in response to defendant's summary judgment motion; "[i]f a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived . . . .").

Attempting to avoid the consequences of its inaction in the district court, Petitioner, all the while admitting that L&G proved the fact of its contractual relation and privity with Burgess (Pet. at 14), argues here and argued before the Fifth Circuit that L&G did not meet its Rule 56 burden of establishing no question of material fact as to privity. Accordingly, Petitioner's argument goes, it, as nonmovant, did not have even to address L&G's contentions on privity.

Petitioner is incorrect on two bases. First, the case law is clear that to preserve its rights to appeal an issue, a party faced with a motion for summary judgment must respond with controverting evidence and/or arguments setting forth its legal theories. In *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992), the court set forth the procedure to be followed. Once the movant identifies the portions of the record which highlight the absence of any factual issues, "the nonmovant must then direct the court's attention to evidence . . . to establish . . . a genuine issue of material fact . . . ." *Id.* at 1131. A party may not remain silent and then on appeal "advance new theories or raise new issues to secure reversal." *Id.* at 1132 n.10. *See also Dahlberg*, 836 F.2d at 919 (finding that because appellee had not submitted any affidavit, discovery, or even pleadings to controvert the facts established by the movant, appellee had not raised any genuine issues of material fact). Plainly, even if the nonmovant contests only the legal effect or legal theory relating to an uncontroverted fact, it must so advise the district court.

Further, even though Petitioner failed to contest the fact or effect of L&G's privity with Burgess, the district court below, like the district court in *Dahlberg*, properly examined L&G's evidence, and found that the record established that privity to satisfy *res judicata* standards existed between L&G and Burgess:

> Because Landis & Gyr Industrial Control Division was sold to SAIA, Inc. under an Asset Purchase Agreement, and SAIA, Inc. merged with Burgess Holdings PLC to form Burgess-SAIA, Inc., Landis & Gyr's interests were adequately represented by Burgess.

(Pet. Appendix at A-4-8.) The district court thus affirmatively found that L&G had met its burden under Rule 56. Petitioner's argument that L&G did not establish all the elements of its case is disproved by the record as well as by the district court's specific determination. It is also noteworthy that, contrary to Petitioner's assertions in this Court (Pet. at 4, 5, 11), Petitioner did not argue in the district court that L&G had failed to meet its Rule 56 burden to establish the elements of privity sufficient to invoke *res judicata*. (Response to Landis & Gyr's Motion for Summary Judgment, Tr. Vol. 7, pp. 1-116.)

Petitioner's cases (Pet. at 6-7) do not establish any basis on which the district court's review of the summary judgment evidence was insufficient under Rule 56. Petitioner's citations in fact support the procedure followed by the court below. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied"); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 160 (1970) (where movant's affidavits establish a fact, to avoid conceding it, nonmovant must come forward with a contrary affidavit or an affidavit explaining why she cannot); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) ("We resolve factual controversies in favor of the non-moving party, but only when . . . both parties have submitted evidence of contradictory facts. *We do not, . . . in the absence of any proof, assume that the non-moving party could or would prove the necessary facts*" (emphasis the court's)); *Russ v. International Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992) (where defendant pointed to two dispositive issues estab-

lished in the record, it was incumbent on nonmovant to designate "specific facts" demonstrating a triable issue); *Montgomery v. Boshears*, 698 F.2d 739, 742 (5th Cir. 1983) (although plaintiff was not required to—and did not—contradict the summary judgment proof, summary judgment for defendant was affirmed where defendant's proof revealed both an absence of any disputed fact issue and defendant's entitlement to judgment as a matter of law); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) (when the movant has proffered sufficient evidence, the nonmovant "must then come forward with specific offers of evidence to present a material fact dispute").

The history of this case is not similar to that in *John v. State of La. (Bd.)*, 757 F.2d 698 (5th Cir. 1985), and *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277 (5th Cir. 1985), where the district court granted summary judgment simply because the nonmovant failed to file or delayed in filing its response. Nor did L&G provide the district court here with mere conclusions and no facts, as was the situation in *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135 (5th Cir. 1973). These cases are plainly inapposite.

In this court, Petitioner advances yet another theory, one not urged even before the Fifth Circuit; that is, that although L&G and Burgess are in privity, it is the wrong kind of privity. (Pet. at 14-15.) For the reasons stated in Section II below, Petitioner's latest theory lacks merit, just as its prior tardy arguments do. The Court need not, however, even address Petitioner's newest argument. "[O]rdinarily [the Court] will not decide questions not raised or litigated in the lower courts." *City of Spring-*

field, Mass. v. Kibbe, 480 U.S. 257, 259 (1987) (certiorari on the issue of a municipality's employee training improvidently granted where petitioner had not objected to pertinent jury instruction in § 1983 trial against city and police). *See also Ellis v. Dixon*, 349 U.S. 458 (1955) (where the question of vagueness of school board's school property regulations had not been raised in the state court below, it was not open for consideration on certiorari).

Application of the waiver rule is particularly appropriate here, since this Court ordinarily accepts and does not review a district court's application of the Federal Rules of Civil Procedure when affirmed by a court of appeals. *See Appalachian Power Co. v. American Inst. of C.P.A.*, 80 S.Ct. 16 (1959) (petitioner's contentions as to Rule 56 did not suffice to support certiorari). Similarly, petitioner's "wrong privity" contention here, not raised below (as it should have been to comply with Rule 56) has been waived and need not be addressed.

II. THE COURT BELOW PROPERLY DETERMINED THAT BECAUSE L&G WAS IN PRIVITY WITH BURGESS, PETITIONER'S FEDERAL ACTION AGAINST L&G, LIKE ITS ACTION AGAINST BURGESS, IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Petitioner apparently does not seek to appeal to this Court either the Fifth Circuit's application of Texas state law as to a *res judicata* transaction or the affirmance of summary judgment in favor of Burgess. Even if Petitioner had not waived it and could properly raise the issue of the legal effect of L&G's privity with Burgess, Petitioner could demonstrate no error by the courts below, much

less any issue as to which this Court could appropriately grant certiorari under its rules and practice.

Petitioner both misstates and misunderstands the nature of *res judicata* privity. Ignoring long-established Fifth Circuit law on the subject, Petitioner claims that a predecessor in interest is not for *res judicata* purposes in privity with a successor in interest. (Pet. at 15.) The true rule was, however, enunciated by the court in *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977), which Petitioner cites with evident approval. (Pet. at 15.) The court there held that defendant airlines were bound by a judgment in prior litigation by the City of Dallas, because the city adequately represented defendants' only legal interest in the issues. Acknowledging the principle that "judgments can bind persons not party to the litigation in question," the court defined *res judicata* privity:

> "[P]rivity" denotes a legal conclusion rather than a judgmental process . . . . [I]t represents the legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.

Id. at 95 (quoting in part Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964)). Relationships which meet the standard, the court went on, include 1) that between a non-party successor to an interest in property and his predecessor, a party to a judgment; 2) that between a non-party who controlled the original suit and a party to it; and 3) that between a non-party and a party who adequately represented the non-party's interests in the original suit. *Id.*

It was this third category of privity that L&G demonstrated and the district court found. As a defense to Burgess' counterclaim, Petitioner alleged contractual breaches and misconduct from 1983 on by both L&G *and* Burgess. Burgess, bound by and related to L&G by the Asset Sale Agreement, adequately represented L&G's interest by litigating (to the extent necessary) Petitioner's court claims and defenses. It is axiomatic that *res judicata* bars all claims and defenses which were actually litigated or which could with diligence have been litigated in the prior action. *Baudoin v. Bank of Lafayette*, 981 F.2d 736, 743 (5th Cir. 1993).

As Petitioner's own cited cases demonstrate, Fifth Circuit law on *res judicata* privity has not changed since *Southwest Airlines*. *See, e.g., Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990) (stating the rule that where one could and should have brought a claim in prior litigation, it is barred in a subsequent suit); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) ("Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties [in] a subsequent suit raising identical issues.")

Ignoring the controlling federal precedent and the Fifth Circuit's definitions of privity, Petitioner offers as the sole support for its wrong-kind-of-privity argument an 18-year-old Ohio state court case, *Litton ABS v. Red-Yellow Cab Co.*, 411 N.E.2d 808 (Ohio Ct. App. 1978), in which the court did not rely upon or apply the current and relevant definition of *res judicata* privity. *Litton* can have no application in this case.

CONCLUSION

Because Petitioner did not contest the fact or legal effect of the privity of contract between L&G and Burgess before the district court, the appellate court correctly held that issue waived. L&G fully complied with its obligations under Rule 56 to establish the absence of an issue of material fact and its entitlement to judgment as a matter of law, and the district court properly found that L&G had met its burden and established its right to the bar of *res judicata*. Substantively, the record fully demonstrates that because Burgess represented L&G's interests in the original state court suit, it and L&G were in privity for *res judicata* purposes. For these and all the other foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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